

1996 CASE DIGEST INDEX

VOLUME 32

Editor's Note: The cases in the Index have been classified to conform to the *Criminal Law Digest* (third edition).

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PART I—STATE CRIMES

1. VALIDITY OF CRIMINAL STATUTES IN GENERAL

§ 1.00 Statute held not void for vagueness

New York *People v. Cole*, 652 NE2d 912 (1995), 32 CLB 299. Inclusion of conduct with depraved indifference to human life as element of second-degree murder did not render the statute void for vagueness.

3. NATURE AND ELEMENTS OF SPECIFIC CRIMES

§ 3.80 Drug Violations

§ 3.85 —Possession

New York *People v. Sanchez*, 652 NE2d 925 (1995), 32 CLB 300. Conviction for possession of a specific amount of drugs ordinarily requires proof that defendant was aware of the weight of the drugs he possessed.

§ 3.105 Escape from custody

Connecticut *State v. Woods*, 662 A2d 732 (1995), 32 CLB 296. Jury instruction permitting defendant's conviction for escape from community residence based on evidence that he failed to report to his parole officer was misleading.

§ 3.110 Family offenses

Iowa *State v. Kellogg*, 542 NW2d 514 (1996), 32 CLB 483. For purposes of domestic abuse statute, whether a couple are "cohabitating" is a question of fact for the jury.

§ 3.115 —Child abuse

Wisconsin *State v. Sostre*, 542 NW2d 774 (1996), 32 CLB 386. A live-in boyfriend who voluntarily takes care of a child is a "person responsible for the welfare of a child" for purposes of a sentencing enhancement for child abuse.

§ 3.267 Intentional transmission of HIV virus

Maryland *Smallwood v. State*, 661 A2d 747 (App. 1995), 32 CLB 89. Defendant, who was aware that he was HIV-positive, committed attempted murder when he attempted to rape a woman without using a condom.

§ 3.270 —Scientific tests

Oregon *State v. O'Key*, 899 P2d 663 (1995), 32 CLB 203. Results of horizontal gaze nystagmus test are admissible to prove person is under the influence of alcohol, but not to establish that a person's blood alcohol content was above the legal limit.

South Dakota *State v. Vandergrift*, 535 NW2d 428 (1995), 32 CLB 85. Implied consent law for blood alcohol test does not apply to private blood samples taken by treating physicians or their agents for medical purposes.

§ 3.353 Racketeering

Georgia *Green v. State*, 466 SE2d 577 (1996), 32 CLB 490. Defendant could not be convicted of "street gang terrorism" absent proof of a pattern of criminal gang activity.

§ 3.412 Witness tampering

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Nebraska State v. Cisneros, 535 NW2d 703 (1995), 32 CLB 199. Paying boyfriend of alleged assault victim not to report the incident to the police constituted witness tampering.

4. CAPACITY

§ 4.10 Insanity—substantive tests

Nevada Miller v. State, 911 P2d 1183 (1996), 32 CLB 488. A person may benefit from the *McNaughton* insanity defense if he shows he was insane during the temporal period that coincides with the crime.

6. DEFENSES

§ 6.20 Entrapment

Massachusetts Commonwealth v. Garcia, 659 NE2d 741 (1996), 32 CLB 391. Court rejected theory of "sentencing entrapment," whereby government agents induce drug dealer to sell larger quantity of drugs than he usually sold so as to obtain enhanced sentence.

PART II—STATE CRIMINAL PROCEDURES, ANCILLARY PROCEEDINGS

8. PRELIMINARY PROCEEDINGS

§ 8.25 Bail

Massachusetts Commonwealth v. Viverito, 661 NE2d 1304 (1996), 32 CLB 487. Holding defendant in custody for thirty hours without bail, arraignment, or a hearing was not grounds for dismissal of the charges in the absence of prejudice to defendant.

9. INDICTMENT AND INFORMATION

§ 9.05 Probable cause

Kansas State v. Bockert, 893 P2d 832 (1995), 32 CLB 203. Defendant's presence in car that held illegal substances, combined with other circumstantial evidence, constituted probable cause that a crime was committed.

10. PRETRIAL MOTIONS

§ 10.00 Motions addressed to sufficiency of indictment

§ 10.05 —Indictment held sufficient

Massachusetts Commonwealth v. Leitzsey, 659 NW2d 1168 (1996), 32 CLB 482. Prosecutor could present evidence before the grand jury by reading statements of witnesses and then having witnesses verify the statements.

§ 10.30 Motion to suppress

Minnesota State v. Zanter, 535 NW2d 624 (1995), 32 CLB 90. State could appeal unfavorable ruling on motion to suppress before trial when the evidence in question was critical to state's ability to prosecute defendant successfully.

11 DISCOVERY

§ 11.00 In general

§ 11.25 —Records

New Hampshire State v. Puzzanghera, 663 A2d 94 (1995), 32 CLB 297. Defendant in drug case could not obtain discovery of police officer's

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file based on bare rumors that he officer had participated in a drug rehabilitation program.

New York People v. DaGata, 652 NE2d 932 (1995), 32 CLB 299. Requiring disclosure of FBI's notes on DNA testing of defendant's and victim's blood was consistent with New York's philosophy of broad pretrial disclosure.

Pennsylvania Commonwealth v. Rucci, 670 A2d 1129 (1996), 32 CLB 489. Denial to full discovery request was not abuse of discretion when defendant failed to show how disclosure would benefit his case and how it was material.

§ 11.35 Sanctions for discovery violations

Illinois People v. Newberry, 652 NE2d 288 (1995), 32 CLB 298. Dismissal of indictment was proper discovery sanction for prosecution's destruction of evidence following discovery request.

12. GUILTY PLEAS

§ 12.35 Duty to inquire as to factual basis for plea

Kansas State v. Shaw, 910 P2d 809 (1996), 32 CLB 488. Trial court's recitation of the elements of the crime coupled with defense counsel's stipulation that plea had factual basis was sufficient inquiry into factual basis for plea.

§ 12.40 Equivocal guilty plea

§ 12.45 Duty to advise defendant of possible sentence

Connecticut State v. Domian, 668 A2d 1333 (1996), 32 CLB 482. Failure to advise defendant of ten-year mandatory minimum sentence was not ground for overturning guilty plea when trial judge advised defendant he would impose ten-year sentence.

§ 12.55 Effect of involuntariness of plea

§ 12.60 —Misunderstanding

Ohio State v. Engle, 660 NE2d 450 (1996), 32 CLB 485. Plea was not made knowingly and intelligently when defendant wrongly believed she could appeal trial court's rulings and neither prosecutor nor judge refuted that belief.

§ 12.70 Motion to withdraw guilty plea

Massachusetts Commonwealth v. Russin, 649 NE2d 750 (1995), 32 CLB 84. Defendant's claim that his guilty plea was involuntary was denied when he was declared fit to stand trial by court psychiatrist.

§ 12.75 —Grounds

North Dakota State v. Halton, 535 NW2d 734 (1995), 32 CLB 200. Court's rejection of sentence recommended by state was not grounds for withdrawal of plea agreement when defendant was clearly aware of nonbinding nature of sentence recommendation.

13. EVIDENCE

ADMISSIBILITY AND WITNESSES

§ 13.20 Relevancy and prejudice

Illinois People v. Williams, 649 NE2d 397 (1995), 32 CLB 84. Testimony relating defendant's past actions was admissible because its purpose was not to show propensity to commit crime but rather that defendant had the physical strength necessary to commit crime.

§ 13.50 Proof of other crimes

Connecticut State v. Jones, 662 A2d 1199 (1995), 32 CLB 297. Bifurcated trial is ordinarily required for capital murder charge that depends on proof that defendant previously committed another intentional or felony murder.

§ 13.55 Proof of other bad acts

Arizona State v. Roscoe, 910 P2d 635 (1996), 32 CLB 487. Other bad acts involving "sexual

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aberration" are admissible to show defendant's propensity to commit a similar crime.

Arkansas *Clark v. State*, 913 SW2d 297 (1996), 32 CLB 387. At trial of man accused of raping his daughter, the daughter was permitted to testify as to other acts of abuse by her father against herself and another girl.

Massachusetts *Commonwealth v. Brousseau*, 659 NE2d 724 (1996), 32 CLB 485. Relevant evidence is not rendered inadmissible merely because it indicates that defendant may have committed an offense other than that for which she is being tried.

South Dakota *State v. Ondricek*, 535 NW2d 872 (1995), 32 CLB 202. Evidence of prior bad acts that occurred twenty years earlier was admissible to prove intent and common scheme or plan in child molestation case.

§ 13.70 Circumstantial evidence

§ 13.80 —Flight

North Dakota *State v. House*, 456 SE2d 292 (1995), 32 CLB 87. Although the defendant returned to his home after allegedly committing murder, evidence indicating that he acted to avoid apprehension warranted the court's instruction on flight to the jury.

§ 13.115 Identification evidence

Rhode Island *State v. Andrade*, 657 A2d 538 (1995), 32 CLB 83. Defendant's motion to suppress identifications was denied because, despite the suggestiveness of the identification procedures, the victim-witness met the court's standard of reliability.

§ 13.170 Privileged communications

Nevada *Griego v. State*, 893 P2d 995 (1995), 32 CLB 86. Defendant in a sexual assault of a minor case was entitled to have alleged child-victim examined by an expert in psychiatry when the case against the defendant depended on that child's testimony.

Wyoming *Vit v. State*, 909 P2d 953 (1996), 32 CLB 385. Defendant's statement to mental-health counselor was not privileged when defendant conveyed to the counselor a threat to a readily identifiable victim.

§ 13.305 Sequestration of witnesses

New York *People v. Geraci*, 649 NE2d 817 (1995), 32 CLB 85. Witness's grand jury testimony was admissible as direct evidence when witness's subsequent unavailability to testify at trial was proven to be the result of the defendant's misconduct.

§ 13.315 Hearsay evidence

Maine *State v. Long*, 656 A2d 1228 (1995), 32 CLB 83. Witness may not testify as to a statement made by another if that statement violates the hearsay rule and is offered as the sole proof of the matter asserted.

§ 13.320 Recorded statements

§ 13.321 —Videotaped testimony

Missouri *State v. McClintock*, 913 SW2d 124 (App. 1996), 32 CLB 480. Videotape of prosecutor's interview with child sodomy victim was admissible; prosecutor's questions were not calculated to lead victim to make particular statement or act in particular way.

§ 13.360 —Declarations of co-conspirators

Massachusetts *Commonwealth v. Nascimento*, 659 NE2d 745 (1996), 32 CLB 391. Statement of defendant's accomplice was admissible as statement of joint venturer when it was made in the course of a common criminal enterprise and there was corroborating evidence that both parties were joint venturers.

WEIGHT AND SUFFICIENCY

§ 13.380 Sufficiency of evidence

§ 13.385 —Drug violations

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Hawaii State v. Wallace, 910 P2d 695 (1996), 32 CLB 487. Defendant's conviction for promoting a dangerous drug was reversed when inadequate foundation was laid to show that the net weight of the cocaine as measured by the balance was accurate.

§ 13.427 Sex offender profile testimony

Kentucky Tunge v. Commonwealth, 901 SW2d 41 (1995), 32 CLB 204. Psychiatrist's testimony that defendant did not satisfy his "indicators for pedophilia" was inadmissible as unscientific and as invasion of the jury's province.

New Hampshire State v. Cavaliere, 663 A2d 96 (1995), 32 CLB 298. Sex offender profile was not admissible because there are as yet no scientifically reliable indicators of child sexual abuse.

14. TRIAL

§ 14.37 Right to bifurcated trial

Rhode Island State v. Hightower, 661 A2d 948 (1995), 32 CLB 201. In Rhode Island, a bifurcated trial is neither constitutionally mandated nor statutorily authorized.

§ 14.150 Conduct of prosecutor

§ 14.205 —Suppression of evidence

Iowa State v. Romeo, 542 NW2d 543 (1996), 32 CLB 483. Failure to disclose that prosecutor had agreed not to prosecute witness against defendant as a habitual criminal was not material to defendant's guilt.

Massachusetts Commonwealth v. Schand, 653 NE2d 566 (1995), 32 CLB 89. Prosecutor's promise to be fair to potential witness facing criminal charges cannot be construed as secret inducement for favorable testimony; prosecutor has general obligation to be fair.

15 JURY

INSTRUCTIONS

§ 15.60 "Allen" dynamite charge

Nevada Staude v. State, 903 P2d 1373 (1996), 32 CLB 388. "Allen" charge was not unduly coercive when it clearly informed jurors that they were not to give up a conscientious conclusion in order to reach a verdict.

§ 15.130 Duty to charge on essential elements of crime

Connecticut State v. Mozell, 668 A2d 1340 (App. 1996), 32 CLB 481. Flawed instruction on accessorial liability was not basis for overturning defendant's conviction when jury was not thereby misled.

§ 15.165 "Missing witness" instructions

South Dakota State v. McGarrett, 535 NW2d 765 (1995), 32 CLB 201. Jury should not be instructed to draw an adverse inference from state's failure to call a witness if witness was available to both parties.

VERDICT

§ 15.305 Duty of trial judge to poll jury or conduct inquiry into juror misconduct

§ 15.310 —Duty of trial judge to grant mistrial

Vermont State v. Martel, 670 A2d 846 (1995), 32 CLB 490. Mistrial was not required when statement given at trial was only slightly more prejudicial than that on voir dire.

§ 15.320 Requirement of unanimity

Washington State v. Fortune, 909 P2d 930 (1996), 32 CLB 385. A jury was not required to agree unanimously on whether defendant committed first-degree murder by premeditating the act of killing the victim during a felony; alternative grounds are permissible.

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§ 15.330 Directed verdict

Arkansas *Galvin v. State*, 912 SW2d 932 (1996), 32 CLB 480. Directed verdict will be denied when the evidence supporting the jury's verdict is substantial, that is, forceful enough to compel reasonable minds to reach a conclusion.

16. POST-TRIAL MOTIONS

§ 16.00 Motion for new trial

§ 16.10 —Unconstitutionality of conviction

Illinois *People v. Jimerson* 652 NE2d 278 (1995), 32 CLB 298. The knowing use of perjured testimony to obtain a criminal conviction violates due process and entitles defendant to a new trial.

17. SENTENCING AND PUNISHMENT

SENTENCING

§ 17.10 Pre-sentence report—contents

§ 17.20 —Trial court's reliance upon material not contained in pre-sentence report

Maine *State v. Wilson*, 669 A2d 766 (1996), 32 CLB 484. Trial court was free to consider unsolicited sentencing recommendations from community members when sentencing individual who raped and killed his own daughter.

Mississippi *Reynolds v. State*, 658 So. 2d 852 (1995), 32 CLB 90. Defendant, who was "blindsided" at the sentencing hearing by charges not contained in the presentence report, was entitled to new hearing on the issue of his sentence.

§ 17.85 Power to dismiss habitual criminal charge

Kentucky *Davis v. Commonwealth*, 899 SW2d 487 (1995), 32 CLB 88. The Commonwealth must prove all elements of persistent felony offender status beyond a reasonable doubt; otherwise, an enhanced sentence will be reduced.

PUNISHMENT

§ 17.101 Imposition of restitution

Iowa *State v. Klindt*, 542 NW2d 553 (1996), 32 CLB 387. Defendant, accused of first-degree murder but convicted of second-degree murder, was not thereby entitled to reduction of amount of restitution for which he was liable.

South Dakota *State v. Henjum*, 542 NW2d 760 (1996), 32 CLB 386. Imposition of restitution without notification in the plea bargain is a denial of due process, but defendant waived the error by not objecting before the trial court.

§ 17.105 Excessive sentences

Louisiana *State v. Baxley*, 656 So. 2d 973 (1995), 32 CLB 87. Fact that sentence for solicitation of "unnatural carnal copulation" was harsher than that for prostitution did not render the sentence excessive.

§ 17.125 Multiple punishment—in general

§ 17.145 —Enhancement

California *People v. Bland*, 898 P2d 391 (1995), 32 CLB 90. Presence of a firearm in close proximity to cache of drugs in defendant's possession is enough to support sentence enhancement for being armed in commission of felony.

§ 17.165 —Consecutive sentences

Pennsylvania *Commonwealth v. Graham*, 661 A2d 1367 (1995), 32 CLB 296. Death sentences could not be made consecutive to sentences of life imprisonment and term of years.

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Georgia *In re Kennedy*, 466 SE2d 1 (1996), 32 CLB 484. Attorney may not avail himself of the entrapment defense in a disciplinary proceeding.

Iowa Iowa Supreme Court Board of Professional Ethics & Conduct v. Marcucci, 543 NW2d 879 (1996), 32 CLB 489. An attorney may be suspended from practice for the commission of a felony in the absence of moral turpitude or any discernable effect on his law practice.

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Court of Appeals, 5th Cir. *United States v. Allen*, 76 F3d 1348 (1996), 32 CLB 383.

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§ 24.90 False statement to federal department or agency

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§ 24.135 Hobbs Act

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Court of Appeals, 9th Cir. *United States v. Burt*, 76 F3d 1064 (1996), 32 CLB 382. Improper entrapment instruction was harmless error.

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Court of Appeals, 8th Cir. *United States v. Jackson*, 67 F3d 1359 (1995), 32 CLB 197. Introduction of prejudicial firearms evidence did not outweigh probative value.

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Court of Appeals, 1st Cir. *United States v. Trenkler*, 61 F3d 45 (1995), 32 CLB 81. Error in introduction of statistical data was harmless.

Court of Appeals, 6th Cir. *United States v. Merriweather*, 78 F3d 1070 (1996), 32 CLB 477. Jury instruction regarding taped conversation relating to another conspiracy required reversal.

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§ 34.135 Privileged communications

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Court of Appeals, 2d Cir. *United States v. Hourihan*, 66 F3d 458 (1995), 32 CLB 197. District court did not abuse its discretion in allowing evidence of prior felony.

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Court of Appeals, 5th Cir. *United States v. Tolliver*, 61 F3d 1189 (1995), 32 CLB 80. Statements of two shooting victims were not admissible as dying declarations or excited utterances.

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Court of Appeals, 3d Cir. *United States v. Skolow*, 81 F3d 397 (1996), 32 CLB 478. Summary of unpaid insurance claims was admissible under business records exception to hearsay rule.

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Court of Appeals, 2d Cir. *United States v. Rivera*, 61 F3d 131 (1995), 32 CLB 82. Improper reference to defendant's prior incarceration required reversal.

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Court of Appeals, 7th Cir. *Dellenbach v. Hanks*, 76 F3d 820 (1996), 32 CLB 382. Third petition for habeas corpus was not abuse of writ.

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Court of Appeals, D.C. Cir. *United States v. Dyce*, 78 F3d 610 (1996), 32 CLB 478. Government appeal from downward sentencing departure was granted.

Court of Appeals, 1st Cir. *United States v. Kelley*, 76 F3d 436 (1996), 32 CLB 380. Sentence enhancement for obstruction of justice was proper.

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§ 38.50 Re-sentencing

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§ 43.80 —Interpretations by state courts

Kansas State v. Lewis, 899 P2d 1027 (1995), 32 CLB 203. Failure to give *Miranda* warnings to prisoner in custody for ten hours until he had incriminated himself necessitated suppression of his subsequent confession and required a new trial.

§ 43.90 Waiver of *Miranda* rights

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Minnesota State v. Wilson, 535 NW2d 597 (1995), 32 CLB 85. Nothing short of an unambiguous and unequivocal invocation of the right to remain silent will be sufficient to invoke *Miranda* protections.

§ 43.105 —Effect of request for counsel

Arizona State v. Spears, 908 P2d 1062 (1996), 32 CLB 389. To invoke the right to counsel during questioning, the request must be sufficiently clear that a reasonable police officer would understand the statement as a request for counsel.

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Court of Appeals, D.C. Cir. *United States v. Leggett*, 81 F3d 220 (1996), 32 CLB 476. Defendant's questioning of witnesses and presentation of arguments did not violate his Sixth Amendment rights.

Court of Appeals, 1st Cir. *United States v. Campbell*, 61 F3d 976 (1995), 32 CLB 81. Defendant was not entitled to proceed pro se and to be represented by counsel in same trial.

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Court of Appeals, 5th Cir. *United States v. Riggio*, 70 F3d 336 (1995), 32 CLB 292. Defendant's conviction for conspiracy to commit arson and for use of firearm in the commission of a federal felony did not violate bar against double jeopardy.

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